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No. 85-1129

In The

Supreme Court of the United States

October Term, 1985

PAUL E. JOHNSON,

Petitioner,

vs.

TRANSPORTATION AGENCY, SANTA CLARA COUNTY CALIFORNIA, and SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 715,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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THE SUGGESTION OF MOOTNESS IS INCORRECT

The Respondents, the Transportation Agency and Local 715, Service Employees International Union (SEIU), incorrectly argue that the case is moot. Agency Br. 10. SEIU Br. 14-15. So long as Petitioner has remaining claims to compensation under Title VII, his case is not moot. *Firefighters Local No. 1784 v. Stotts*, 467 U.S. 561, 571 (1984) (employees' Title VII claims not moot after being restored to or offered their positions). Like the nonminority firefighters in *Stotts*, Petitioner although retired, still has outstanding claims for the pay differential between Road Dispatcher and Road Maintenance Worker II and pension contributions.[1] Petitioner's Lodging, (hereafter Pet. L.) § 1.

The Agency did not immediately promote Petitioner despite the express order by the District Court and the Agency never paid Petitioner the difference in wages. J.A. 147-148; Pet. L. § 1, 1-2. Petitioner's promotion on May 19, 1983, came only after the Agency created a third Road Dispatcher position in the South Yard to which Diane Joyce was appointed.[2] Joyce was appointed without notice or competition under the Merit System Rules, displacing a male Agency employee who had been working out of class as the road dispatcher in the South Yard. Pet. L. §1, 4. Apparently, the Agency delayed in pro-

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[1]The Agency did not make commensurate contributions to Petitioner's pension account until he was actually promoted. Consequently, Petitioner receives an estimated $50 a month less. Petitioner's Lodging (hereafter Pet. L.) § 1, 2.

[2]Prior to 1983, the two Road Dispatcher positions were in the East and West Yards. In 1976, Petitioner unsuccessfully requested creation of a Road Dispatcher position at the South Yard. Pet. L. § 1, 3.

moting Petitioner until it could create a new job so that Joyce could keep her promotion.[3]

Under Title VII's policy of "make whole" relief, Petitioner is entitled to the pay differential for those six months and commensurate pension contributions.[4] If the District Court's order is not reinstated, the Agency will be under no compulsion to compensate Petitioner fully for his economic losses resulting from the Agency's unlawful promotion decision. These outstanding claims for compensation mean that Petitioner's case is not moot.[5]

I. THE FINDINGS OF FACTS BY THE DISTRICT COURT CANNOT BE REVERSED ABSENT A SHOWING THAT THEY ARE "CLEARLY ERRONEOUS."

Respondents attempt to retry this case by rearguing the findings of fact made by the District Court and undisturbed by the Court of Appeals.[6] Without even acknow-

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[3]The 1982 Agency Affirmative Action Plan only lists two Road Dispatcher positions and does not state that a new position was contemplated. S.E.R. 206.

[4]The fact that Petitioner accepted payment from the Agency for the pay differential covering June, 1980 to December, 1982, does waive his claims arising out of the Agency's failure to comply with the District Court's order. SEIU Br. 10. The warrant did not include the last five months.

[5]It is unlikely that Petitioner is liable for attorney's fees. Agency Br. 11 n.7. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421-22 (1978) (denying attorney's fees to a prevailing defendant under Title VII, unless the suit was frivolous or without foundation).

[6]The Court of Appeals, in amending its opinion after denying Petitioner's motion for rehearing, implicitly acknowledged that the District Court's findings were not clearly erroneous. Pet. App. 48a-49a.

ledging that the findings of fact are subject to the "clearly erroneous" standard of review, Respondents attack the following findings of fact which are fatal to their legal arguments:

> —that the Santa Clara Transportation Agency did not discriminate in the past and does not now discriminate in the hiring and promotion of women. Pet. App. 13a;
>
> —that the examination and interview process was fair and in accordance with the Merit System Rules, Pet. App. 12a;
>
> —that, based on the examination and interview process, Petitioner was more qualified than Diane Joyce, Pet. App. 12a;
>
> —that but for Petitioner's sex, he would have been appointed, Pet. App. 13a; and
>
> —that Joyce's sex was the substantial and determining factor in her promotion. Pet. App. 13a.[7]

This Court recently analyzed the "clearly erroneous" standard of review for findings of fact by a District Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985).[8] This Court expressly held:

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[7]SEIU argues incorrectly that the finding of no past discrimination is entitled to no weight because both parties asked for it. SEIU Br. 10. The Agency offered extensive testimony of individual unrelated acts of alleged discrimination and argued that these acts, plus the work force statistics provided sufficient basis for affirmative action.

[8]In *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Court held that a finding of intent to discriminate was a finding of fact subject to the "clearly erroneous" standard of review under *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

Id. at 573-74, (*citing United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)).

The District Court's extensive findings of fact followed a two day trial.[9] Respondents merely rehash the facts Petitioner established at the trial.[10] Nor can the Agency's Lodging concerning *Pacheco v. Santa Clara County Transportation Agency* rebut the District Court's finding. Any probative value of the consent decree is negated by the fact that this was a sexual harrassment case and the factual elements differ. *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399 (1986). This is insufficient to meet the very heavy burden necessary to create the "definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573

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[9]Most of the Agency's evidence consisted of post hoc rationalizations for the Plan. This method of justifying discrimination was questioned in *University of California Regents v. Bakke*, 438 U.S. 265, 295 n.34 (1978).

[10]SEIU cites Exhibit 12, as proof that the candidates were equally qualified. SEIU Br. 9; J.A. 27-28. The document, which purports to summarize the candidates' qualifications, was prepared *after* the Director had decided to appoint Joyce, RT II, 222:21 to 226:22, by an employee who played no role in the decision, RT II, 219:3-4, and without reference to the candidates' scores from the two oral boards.

(1985) (*citing United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)).

II. RESPONDENTS' CLAIMS TO REMEDIAL PURPOSE FOR THE PLAN ARE BASED ON INADEQUATE DATA AND POST HOC RATIONALIZATIONS.

Respondents argue that the work force statistics were sufficient to support the Plan's employment goals, and, by implication, the District Court's finding was not clearly erroneous. However, the statistics were too incomplete to support any inference of discrimination, let alone prove that the District Court's finding of fact was clearly erroneous. The local labor pool could never have supported the employment goals for women in the plan. These hiring patterns create an inference that very few women ever applied, and those that did were hired.

Without any credible evidence of discrimination, the District Court correctly declined to infer a remedial purpose for the Plan based solely on the statistical imbalances. Pet. App. 9a. The Court of Appeals ignored the District Court's finding of fact that the Agency had not discriminated by concluding that it was irrelevant. Rather the statistical differences in the number of women employed by the Agency and the number of women working generally in the county constituted historical job segregation that supported the Plan. Pet. App. 26a, 49a. This conclusion ignored the record which offered a number of explanations for the statistical differences.

Gross disparities in the racial composition of a workforce, without explanation, may be a 'telltale' sign of discrimination. *Teamsters v. United States*, 431 U.S. 324, 340

(1977). However, statistics can be rebutted like other circumstantial evidence.[11]

Respondents incorrectly state that Petitioner failed to rebut the statistics. Agency Br. 21. SEIU Br. 19. Petitioner's counsel established in testimony that few, if any, women applied for road crew work despite extensive recruiting efforts, that the Road Dispatcher job should have been classified as Office and Clerical, for which there was no underrepresentation of women, and that the Agency could not show that any women had ever applied for Skilled Craft Worker jobs because it did not keep any applicant statistics.[12] The record and census data further support Petitioner's claims that the statistics do not war-

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[11] If the defendants in a Title VII suit believe there to be any reason to discredit plaintiffs' statistics that does not appear on their face, the opportunity to challenge them is available to the defendants just as in any other lawsuit. They may endeavor to impeach the reliability of the statistical evidence, they may offer rebutting evidence, or they may disparage in arguments or in briefs the probative weight which the plaintiffs' evidence should be accorded.

Dothard v. Rawlinson, 433 U.S. 321, 338-39 (1977) (Rehnquist, J., concurring).

[12] SEIU argues that experience barriers for the Road Dispatcher position excluded women. SEIU Br. 12. However, the job required either dispatcher or road maintenance experience. Moreover, women were not underrepresented because the Agency employed 15 Dispatchers, 3 of whom were women when Petitioner was denied his promotion. S.E.R. 69. By 1981, 8 women of the 33 positions were dispatchers, excluding Joyce. S.E.R. 202. The California census data show that in 1970 the relevant labor market for women dispatchers was 16.3%, compared to the Agency's 20% women dispatchers. Pet. L. § 3 at 3.

rant an inference of discrimination against women.[13] The Agency's hiring patterns suggest that few, if any, women applied, that the Agency hired minority employees, and that 66% of the new positions went to members of the protected groups. Thus, Respondent failed to make a *prima facie* case that there was discrimination requiring a remedy.

A. The Affirmative Action Plan Incorrectly Presumes "Underrepresentation" Without Reference to the Relevant Labor Pool.

Respondent Agency did not keep data of the applicants and, therefore, could not show that the statistics were not the product of self-selection. The District Court correctly declined to find the statistical disparity probative because the statistics do not reflect the relevant labor pool. The long range employment goals in the Plan are based on the raw percentages of women and minorities in the work force, without reference to relevant labor pool.[14] Therefore, the conclusions of significant underrepresentation of women are unsupported.

This Court has recognized that statistics are probative only when there is a gross disparity in comparison to the relevant labor market. *Teamsters v. United States,* 431

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[13]This Court can take judicial notice of census data. *Castenada v. Partida,* 430 U.S. 482, 486 n.6 (1977). Photocopies of the census charts are provided in Pet. L. §§ 3-4.

[14]The Agency Director stated revision of the goals to reflect relevant labor market was discussed but "it never got very far." RT I 50:23-25; 51:1-5. Thomas protested that the goals were unrealistic. RT II 263:6-20. SEIU's effort to discredit Thomas' testimony is unfounded because the judge's comments were made long after Thomas' statement.

U.S. 324, 339-340, and n.20 (1977). When, as was the case here, the employer is selecting from within his workforce, the relevant labor pool is his own employees. *Shidaker v. Carlin,* 782 F.2d 746, 750 (7th Cir. 1986) (*citing Hazelwood School District v. United States,* 433 U.S. 299, 308 n.13 (1977)). Moreover, the facts of this case are very different from those in *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979). The record is bereft of any evidence of segregation or exclusion and there is an express finding of fact that there was none. Nor should this Court take judicial notice of cases finding discrimination against women in construction trades or other studies, as suggested by the Court of Appeals and Respondents' amici. None involve this employer and are, therefore, irrelevant. While Title VII forbids equally both types of discrimination, unlike race, one cannot readily assume that absent discrimination women would be equally represented in all aspects of the work force. Personal and societal attitudes shape women's career and job choices. Furthermore, expanding job opportunities may give women the choice between nontraditional jobs, outdoor or indoor, at comparable pay and opportunity. This theory is consistent with the Agency's difficulty in recruiting women for road maintenance (Service & Maintenance), in comparison to the successful recruiting program for bus drivers (also Service & Maintenance). All of the above factors, unrelated to employment discrimination by the Agency, probably contributed to the statistics at issue here.

Other courts have declined to apply the "gross disparity" rule to sex discrimination without scrutinizing the data supporting the statistics. In *EEOC v. Sears Roebuck & Co.,* 628 F. Supp. 1264 (N.D. Ill. 1986), the court

rejected the EEOC's assumption of discrimination based on a statistical disparity because the EEOC also assumed that men and women were equally interested in commission sales jobs, a fact not supported by the evidence. "[T]he assumptions underlying any statistics must be critically examined by the court." *Id.* at 1287. The lack of applicant data and other information make it impossible to determine whether the disparity has any relation to possible discrimination.

The questions raised about the statistics are supported by census data which shows that the relevant labor market for the allegedly "underrepresented" EEOC categories was never 36.4% as the Plan assumed. The employment goal is based on the raw labor force statistics for Santa Clara County and is incorrect because it fails to deduct the women in occupations not employed by the Agency.[15] Pet. L. § 4-5. Overall, the Agency's employment is close to the relevant labor market for the respective job category,[16] except Skilled Craft Worker. Even here the labor pool was 5%—not 36.4% as prescribed in the plan.

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[15]In 1970, 50,423 women (34% of all women working) in the county were employed in occupations not used by the Agency, such as nurses, teachers, etc. Pet. L. § 4. This female incumbency reduces the available women to 24% of the total county work force, rather than 36.4%.

[16]Data from the 1970 census is used because the plan's goals were based on the 1970 census. In the "Service & Maintenance" category, 22% of the Agency employees were women, as compared to 32% in the labor pool. Pet. L. § 4. In the "Official and Administrator" category, 8.6% of the Agency employees were women as compared to 15% in the labor pool. In the "Professionals" category, 8.6% of the Agency employees were women, as compared to 2% in the labor pool. In the "Office and Clerical" category, the Agency and labor pool were both 75%. In the "Technicians" category, 9.7% of Agency employees were women, as compared to 12% in the labor pool. In the "Skilled Craft Worker" category, there were no women as compared to 5% in the labor pool.

B. Agency Hiring Patterns Suggest that Few Women Applied and Those That Did Were Hired.

The District Court's finding of fact that the Agency did not discriminate is supported by the hiring patterns from 1978 to 1981 which suggest that the statistical imbalances are due to self-selection and not discrimination. Comparisons of the Work Force Utilization Charts in the 1978 and 1982 Agency Plans, S.E.R. 62-70, 194-209, show that the Agency added a total of 749 new positions, excluding clerical where neither women nor minorities are underrepresented.[17] Of the new Agency positions, 496 were filled by protected group employees (101 women, 393 minorities, and 2 handicapped employees) which represent 66% of the new jobs.[18] Minority hiring outstripped women in "Service & Maintenance" and "Skilled Craft Worker" categories and was comparable in the other EEOC categories. This pattern shows that notwithstand-

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[17]Petitioner incorrectly interpreted the Plan as anticipating no new positions in the Roads Division. Pet. Br. 35, 41. Of the 119 new positions in Skilled Craft Worker category, 25 were in the Roads Division. S.E.R. 206. Of these 25 new positions, 13 were new job classifications (Construction Inspector I, Traffic Painter I). S.E.R. 204-206.

[18]The Agency hired 6 women, 57 minorities, and 1 handicapped employee for 119 new positions in "Skilled Craft Worker" category. For the 524 new "Service & Maintenance" positions, the Agency hired 79 women and 305 minorities. For the 80 new "Technical" positions, the Agency hired 19 women, 21 minorities. For the 30 new "Professional" positions, the Agency hired 16 women, 11 minorities, and 1 handicapped. For the four new "Administrator" positions, the Agency hired one woman. S.E.R. 193.

ing aggressive affirmative action hiring, very few women, by comparison to minorities, were hired. This can only be explained on the basis that there were very few women applicants.

III. THE EMPLOYMENT GOALS IN THE AFFIRMATIVE ACTION PLAN VIOLATE THE FUNDAMENTAL PRINCIPLES OF TITLE VII AND THEIR INVALIDATION WILL NOT HINDER VOLUNTARY COMPLIANCE.

There being no evidence in the record to justify reversal of the District Court's finding of fact that the Agency did not discriminate, the only question is whether the Agency can justify its blatant sex discrimination against Petitioner on the basis of its Affirmative Action Plan that seeks to achieve a statistically balanced workforce.[19] Title VII flatly prohibits discrimination on the basis of sex. 42 U.S.C. § 2000e(a). This Court created a very narrow exception to Title VII's flat prohibition in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979). This prohibition of discrimination is more absolute than the standards for the Fourteenth Amendment, which balances the government's reasons for a sex based classification against the impact on the individual's rights.

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[19]SEIU argues that Petitioner has no claim because the Merit System Rules permit selection of any of the top seven candidates. SEIU Br. 8. The District Court correctly rejected this argument, stating "promotion on the basis of gender is a *prima facie* transgression of Federal law, and to that extent the discretion of the appointing authority must be limited." Pet. App. 4a. Nor does state law foreclose judicial review of a federal claim. SEIU Br. 30.

Under this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Agency had to carry the burden of persuasion in establishing a nondiscriminatory reason for discriminating against Petitioner.[20] Even under the *McDonnell Douglas* analysis whereby the Agency had the burden of persuasion to rebut Petitioner's case, the record shows that the Agency failed to carry it by not meeting the *Weber* criteria. *Weber*, 443 U.S. at 208.

Again, the District Court's findings of fact are conclusive. The District Court held that the Agency had not discriminated against women, thereby precluding the conclusion that the Plan's purpose was to "break down historical patterns of segregation or hierarchy." The District Court also held that the Plan was permanent. Pet. App. 13a. Failing two of the four factors considered in *Weber*, the District Court concluded that the Plan was not a valid reason to discriminate and the Agency failed to carry its burden [of going forward to rebut Petitioner's *prima facie* case.] Pet. App. 8a.[21]

The Agency, *citing Wygant v. Jackson Board of Education*, 106 S.Ct. 1849, 1855 (1986) (O'Connor, J., concur-

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[20]The Affirmative Action Plan is not "nondiscriminatory." Thus, the case of *McDonnell Douglas* is not necessarily controlling. Pet. Br. 45-48. The employer, who alleges affirmative action as a defense, should bear the ultimate burden of proving its validity.

[21]The District of Columbia Circuit imposes a higher burden of persuasion on the employer to justify affirmative action. *Toney v. Block*, 705 F.2d 1364, 1366 (D.C. Cir. 1983) (burden of persuasion by 'clear and convincing' evidence) *following Day v. Mathews*, 530 F.2d 1083 (D.C. Cir. 1976).

ring), argues that it need only show that there is a "firm factual basis to infer that they might have discriminated."[22] Agency Br. 13. SEIU, citing *Weber*, argues that only a "factual predicate" is necessary. SEIU Br. 15-16. The Agency's "firm factual basis" is the testimony and the and the Plan's "work force statistics." The fatal flaw in Respondents' arguments is that they describe a decision making process that never occurred. Moreover, had Respondents attempted such an inquiry, the testimony and statistics are wholly insufficient to permit them to infer discrimination, and therefore, are insufficient to immunize Respondents from liability for blatantly discriminating against Petitioner.

As a minimum, the employer should be required to show a *prima facie* case of discrimination before instituting an affirmative action plan that allocates job rights based on sex and race. The statistics in the Plan never met that legal minimum. The "disparity" is not based on the relevant labor market or applicant flow data.[23] Because Respondents' statistics are not based on the relevant labor market, the Agency never established a *prima facie* case.

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[22]Respondents concede the applicability of the Fourteenth Amendment by citing constitutional cases. Respondent also misinterprets Petitioner's point that he makes no claim under the Fourteenth Amendment, but because Respondent is a public employer, it provides the relevant standard. Agency Br. 43-44.

[23]Respondents cite *Teamsters v. United States*, 431 U.S. 324 (1977) and *Hazelwood School District v. United States*, 433 U.S. 299 (1977) for the rule that statistics alone can establish a *prima facie* case. Agency Br. 19-20; SEIU Br. 19-20. However, these cases hold that labor pool data, not general work force data, is probative, and any statistical disparity must be unexplained.

Implicitly conceding that there is no *prima facie* case of discrimination against women to justify the Plan, Respondents complain that to require anything more would force the employer to admit liability under Title VII and expose the employer to lawsuits from minority or women employees. Respondent and amici also assert that invalidating the Plan's employment goals will obstruct voluntary affirmative action. Agency Br. 40. They exaggerate the difficulties presented and ignore the statute's mandate. This Court has clearly held that "voluntary compliance" under Title VII does not permit an employer to ignore other legal obligations. *See W. R. Grace & Co. v. Local Union 759 (Rubber Workers)*, 461 U.S. 757 (1983) (voluntary compliance under Title VII does not warrant breach of collective bargaining agreement); *see also Connecticut v. Teal*, 457 U.S. 440 (1982) (promotion test's disparate impact violates Title VII even though under affirmative action the employer promoted more blacks than whites). It would be extremely anomalous for the Court to hold that a private employer cannot avoid its obligations under a collective bargaining agreement which may conflict with voluntary Title VII compliance, but that a public employer is permitted to completely ignore its constitutional obligation not to discriminate on the basis of sex solely to serve the interest of voluntary compliance. Nor is there any authority or reason to give a public employer greater leeway in implementing affirmative action. The law is explicit and the cases recognize no exception for a public employer.

In light of Title VII's explicit mandate, merely proffering an affirmative action plan should not be a suffi-

cient defense. It is not unreasonable to require an employer to engage in careful scrutiny and reach a conclusion, which can be defended in court, that there has been actual past discrimination. Only the employer can know whether its hiring and promotion practices have been tainted with a discriminatory animus. Without such an effort, there is no reasonable basis for holding that the Plan is intended to be remedial. When the plan is concededly discriminatory, it is entirely appropriate to require the employer to shoulder the burden in justifying it.

There is no evidence in the record that the Agency undertook a careful scrutiny of its employment practices. The phrase "to remedy the effects of past discrimination" first appears in the 1972 County affirmative action plan and appears verbatim in the Agency 1978 and 1982 plans, as well as the 1979 County Plan. J.A. 31, 112, 133. Its repeated use suggests that the Agency relied on this phrase without any analysis or review. Second, the record shows that the employment goals were never revised despite annual reviews. Third, the Agency never tried to use the relevant labor market data. Fourth, the Agency never bothered to collate applicant data, although it is required in the Plan. J.A. 62-63; 71-72; 85-86.

The Agency Plan is hardly typical of affirmative action plans. Invalidation of the employment goals should have no effect on most affirmative action which is less burdensome. For example, the Plan featured a number of alternatives to goals: training programs, creation of entry level positions, and recruiting. RT II, 264:2 through 267:13; J.A. 71-84. The record shows that these actions were successful, 137 women were hired in nontraditional jobs as "coach operators" and as "utility workers," an entry level position for mechanic. J.A. 49-50.

IV. THE PLAN IS NOT NARROWLY TAILORED AND UNNECESSARILY TRAMMELS INDIVIDUAL RIGHTS IN VIOLATION OF THE STANDARDS OF THE FOURTEENTH AMENDMENT AND WEBER.

Even if the Agency had established a predicate for the Plan's employment goals, they are not narrowly tailored and place the full burden on unprotected employees.[24] Respondents' argument that a promotion always forecloses advancement and the Petitioner was not entitled to a promotion miscasts the question. Petitioner's rights are protected by Title VII and the Plan trammeled Petitioner's rights. It also ignores the fact that Petitioner is entitled to be judged against nondiscriminatory standards. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

Moreover, promotion is different from hiring. Respondent Agency's most cynical statement is that, in effect, the Court should ignore the fact that Petitioner has been singled out for discriminatory treatment. Agency Br. 37. But, this is a case about a single employee who devoted his career with the Agency to obtaining a promotion to Dispatcher. There were relatively few oppor-

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[24]Beals testified that the Plan would never protect white males.

> Q: In your mind, if an individual were to apply for a position in the office and clerical category broadly, and that individual were a male, all things being equal, would that individual be given any additional consideration relative to a woman applying for a position in the same category?
>
> A: That was not the concern of the plan, as I understood it, because white males were not members of protected groups.

RT II, 243:16-22.

tunities for promotion. Petitioner could advance to either Road Maintenance III or Road Dispatcher. By all criteria, he succeeded in becoming the best qualified candidate for the job. He was denied that job *because of his sex*. This is different from a job applicant, because the latter has not invested any time or loyalty and has a variety of other places to apply. All of the abstract legal theory cannot alter the fact that but for the Agency's action is fundamentally unfair and should not be permitted unless the Agency had a powerful justification for its action. The Agency's generalized desire to achieve a balanced workforce cannot justify the arbitrary denial of a promotion to Petitioner.

The Plan's stated purpose of achieving a balanced work force which applies to all jobs places undue and possibly unlawful burdens on unprotected employees. Title VII does not require or permit an employer to discriminate in order to have balanced work force.[25]

The absence of narrow tailoring is also demonstrated in the fact that the Plan operates to bar white males from advancement whenever competing with a "protected employee." The Resopndents do not disagree that the Plan imposes substantial personal career penalties for the director who fails to meet affirmative action goals. Pet. Br. 40-42. The Plan also states that "special consideration" should be given to any eligible member of a protected group, when the job is underrepresented. J.A. 60.

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[25]Even for proven and egregious violations of Title VII as in *Local 28 Sheetmetal Workers v. EEOC*, 106 S.Ct. 3019 (1986) (upholding affirmative action remedies, including quotas, training program, and compliance supervision), the court's remedy did not include the requirement that the employer balance his entire work force.

While sex or race is allegedly "one factor," the unrealistic nature of the goals and the pressure to meet them make affirmative action a dominant factor. This is more burdensome than a quota and there is no limit on the use of affirmative action other than the long range goal.

The reaction of the other Agency employees when Joyce was appointed demonstrates the damage to employee morale when the Plan was applied to deprive Petitioner of his promotion. The random use of the Plan made a mockery of the merit system and left the employees disenchanted about its ability to protect their interests. However, employee dissatisfaction was not based on sexual discrimination. Agency Br. 3 n.5. The record leaves little doubt that both the Agency and SEIU lost substantial credibility in discriminating against Petitioner.[26]

The Plan's operation as shown by the hiring patterns of the Agency between 1978 and 1981 also demonstrate the lack of narrow tailoring that trammels individual rights. The Plan's goal of statistical parity in each major job classification makes the plan permanent for all practical purposes. *Ante* at 10-11. Minority hiring dominated new job appointments, especially in the skilled craft and service and maintenance categories because the goal of statistical parity applied to all major job classi-

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[26]SEIU's support for the Plan's goals is of questionable validity. "The same reasons which prohibit an employer from discriminating on the basis of race among the culpable employees apply equally to the union(.)" *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285 (1976). Petitioner was a member of SEIU until the events culminating in this lawsuit. Pet. L. § 1, 4.

fications. Without any provision to end affirmative action when the goal is met in a given EEOC category or job classification, the Agency employs 2 women Road Dispatchers of the 3 positions. S.E.R. 208. With Joyce's promotion, affirmative action should have ended for the Road Dispatcher position. However, because the goal had not been met in the larger EEOC category, affirmative action supported employing another woman. S.E.R. 202. Given the admitted difficulty in achieving the balance sought in all categories at the same time,[27] it is apparent that the Plan is indeed permanent and will operate to maintain parity while trying to achieve parity in other categories and classifications.

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[27]Given the Plan's perpetual application, the use of the term "attain" rather than "maintain" is meaningless. SEIU Br. 13.

CONCLUSION

For these reasons, Petitioner asks this Court to reverse the decision of the Court of Appeals.

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